FILED
DEC 23 1922
WM. R. STANSBU
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 257.

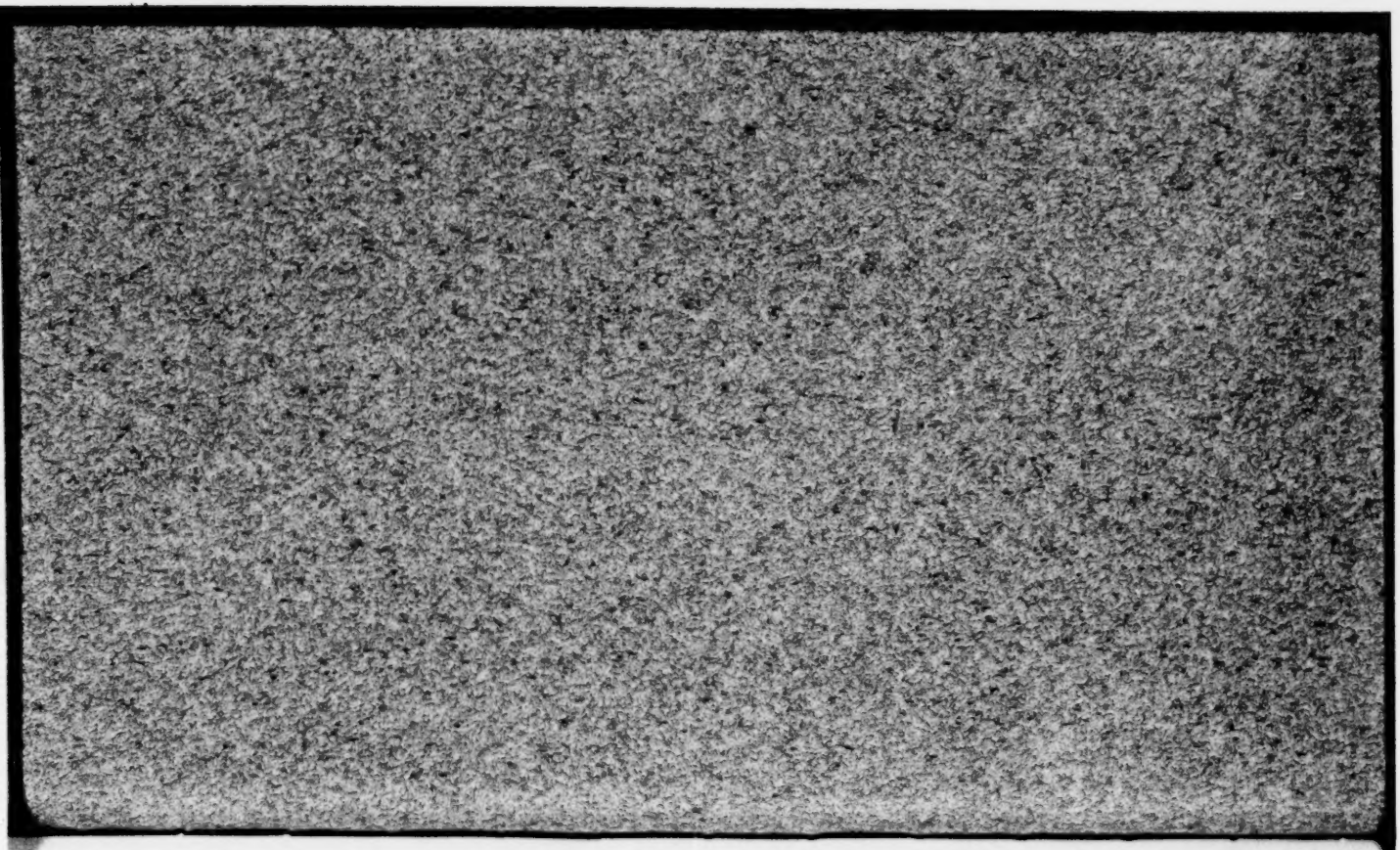
THE PRICE FIRE & WATER PROOFING COMPANY,
Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

S. S. ASHBAUGH,
Attorney for Appellant.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 257.

THE PRICE FIRE & WATER PROOFING COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

The petition in this case was filed in the Court of Claims on September 29, 1920, demanding a judgment for expenses incurred by the plaintiff in the taking and appropriation of its plant, located at Poughkeepsie, New York, and in the destruction of its business as a part thereof, by the officers of the War Department for the purpose of supplying materials for the speedy prosecution of the war with Germany.

To this petition, after sixty days, the statutory traverse was interposed. Testimony was taken by both parties and the case was submitted to the court and judgment rendered on October 31, 1921, in favor of the plaintiff, on each of the first nine causes of action, in the sum of $47,700.08, but judgment was refused for the expenses incurred in an effort to keep "its business alive and its organization existent" down to the time when the testimony was taken in the case, no opinion being filed. No objection was entered by the defendants to the rendition of the judgment in favor of the plaintiff for this $47,700.08 and no appeal therefrom was taken. The plaintiff, however, objected to the refusal of the court to render a judgment upon the facts found in its favor for the expenses incurred in the effort to keep "its business alive and its organization existent" and filed a motion for a new trial demanding judgment for the expenses so found to have been incurred, which motion was by the court, on January 3, 1922, overruled. The plaintiff thereupon made application, on January 12, 1922, for an appeal from the judgment so rendered against it on October 31, 1921, which appeal was, on January 23, 1922, allowed by the court, and on that date the transcript of the record in the case was filed in this court.

II.

Assignments of Error.

First. The court erred in refusing to render judgment in favor of the plaintiff for the expenses incurred by it in its efforts to keep "its business alive and its organization existent" down to February 28, 1921, when the testimony was taken in the trial of the case.

Second. The court erred in rendering judgment, as set down in the conclusions of law, in holding that "otherwise the plaintiff is not entitled to recover," and thus refusing to render judgment for the expenses incurred upon the findings of fact made by the court.

Third. The court erred in overruling the plaintiff's motion for a new trial, where a judgment for these expenses so incurred was demanded in accordance with the facts already found by the court.

III.

Statement of Facts.

The Price Fire & Water Proofing Company has for a long time been and now is a corporation duly organized under the laws of the State of New York for the purpose of treating cloth by dyeing, waterproofing, and fireproofing, preparing and rendering such cloth suitable and in proper condition to be used for curtains in theaters and other similar places, for tents wagon covers, tarpaulins, gas-mask covers during time of war, and other similar purposes, using therein and therefor the different grades of duck or canvas furnished for said treatment and using therefor various original chemical processes most suitable for these purposes. A large and progressive plant had been erected at Poughkeepsie, New York, and an extensive business was secured.

When the war with Germany was declared the officers and agents of the War Department, knowing the superior quality of the plaintiff's output, demanded that the Price Fire & Water Proofing Company should cancel all of its private

business and turn the plant and all of its appliances over to the War Department for the purposes of supplying gas-mask covers, tent and wagon covers, tarpaulins, and other similar facilities for use in the vigorous and successful prosecution of the war with Germany. The officers of the plaintiff corporation objected to many of the conditions imposed, but, upon the demands and threats of the officers of the War Department forcibly to take possession of the plant and to prosecute the officers for resisting the demands thus made, the plant and all of its facilities were in effect commandeered by the officers of the War Department for the uses described and all the orders and demands of the officers of the War Department were complied with, and the whole plant and its facilities were operated under the supervision and in accordance with the directions of the officers and agents of the Government. As a part of the compliance with these orders and demands the entire private business of the plaintiff was given up on January 1, 1918.

All of these conditions, orders, memorandums, and expenses were set out in the petition filed in the court below and found beginning on page 1 of the record.

The first nine counts of the petition, beginning on page 7 and ending on page 18 of the record, include the particular expenses incurred, which expenses were fully described in the evidence and found by the court, beginning on page 32 of the record. Upon the facts so found by the court judgment was rendered in favor of the plaintiff on the first nine counts of the petition in the sum of $47,700.08, to which no objection was made by the defendants and from which no appeal has been taken.

The tenth cause of action, found at page 18 of the record,

alleged the taking of the plant and all its facilities and the cancellation of the private business of the plaintiff at the time the demand was made and the control passed to the Government. The plaintiff alleged in the tenth count of the petition that because of the taking and appropriation of its private property and because of the destruction of its private business as a part thereof it had incurred expenses in an effort to keep the physical property from disintegration and destruction, and in an effort to regain such private business, in an amount not less than $130,000.00, and upon the testimony introduced the court found, in Finding No. XV, on page 37 of the record, as follows:

> "Reference is here made to facts set out in Finding II as to the capitalization of the original company, plaintiff's predecessor, the reorganization, the future course of its business, and the destruction of the plant by fire in October, 1916. The extent to which it had recovered its business during 1917 and the amount thereof during that year is not definitely shown. But whatever it was, it was given up that the capacity of its plant might from January 1, 1918, be devoted to Government work of the kind here involved. When in the latter part of 1917 this arrangement was made the plaintiff's plant, its processes, business, and good will as a going concern were valuable, but what the value thereof was is not shown to the satisfaction of the court on the present record.
>
> "When Government work ceased in November, 1918, the plaintiff had no other business upon which it could continue the operation of its plant and it became idle. The cessation of hostilities left the Government with large quantities of goods on hand of the kind produced by the plaintiff company and by other concerns producing for the Government the

same general character of goods. These goods were sold by the Government at different times in large lots at public auction and generally at prices below cost of reproduction, and the sale of these goods by the Government supplied to a very considerable extent the demands of the trade for this class of goods. In an effort to re-establish its business and preserve the value attaching to its plant as an operating concern and in the belief that if normal conditions should be restored it could again do a profitable business, it has expended considerable sums of money, by operating at a loss, in keeping its business alive and its organization existent, and by reason of such efforts since the cessation of Government work it has sustained an operating loss of $125,000.00. It has not succeeded in re-establishing its business on a profitable basis, and its plant and business are now worth much less than before it took on Government work and devoted its facilities thereto."

These facts, so found by the court below, are undisputed, and the refusal of the court to render judgment in favor of the plaintiff for the $125,000.00 as expenses incurred as described is the error alleged above.

It will be noted that in the $125,000.00 so demanded there is no claim for compensation for property taken or business destroyed or for rental for property used or for loss of profit on business anticipated or canceled. It is here clearly found that the plaintiff's property was taken and used and its business destroyed, and that as a means of preserving its property and organization, and in an effort to regain its business, it actually expended the sum of $125,000.00.

Upon the facts so found by the court the judgment in favor

of the plaintiff, instead of $17,700.08, should have been $172,700.08, for which judgment is now prayed.

The foundation of this last finding just quoted is in the allegations in the tenth cause of action, found on page 19 of the record, where it is alleged:

> "That the appropriation of said plant and its facilities, together with the destruction of the plaintiff's business, as aforesaid, caused great and continuous losses to the plaintiff, not included in any of the causes of action hereinbefore set out, and not including any loss of prospective or possible profits on any part of the orders beyond the goods and supplies delivered to and accepted by the United States, but which are shown in the expenditures necessarily made, in the obligations and liabilities incurred and discharged in performing and preparing to perform said orders and extraordinary demands, in the destruction of the established business and the expenses incurred in the efforts to regain and re-establish the business when the markets had been supplied as aforesaid."

The finding of the court above set out, so closely following this allegation of the petition, clearly warrants the addition of $125,000.00 to the existing judgment, which additional amount alone is involved in this appeal.

IV.

Argument.

The Government is liable for the expenses incurred by the owner of private property resulting from the taking and appropriation of such property for public use, including the

destruction of its private business connected therewith, during the late war with Germany. The court below found the facts on this point in favor of the plaintiff, but refused to render judgment thereon. This was error.

This taking and appropriation of the plaintiff's entire plant and the discontinuance of its business as a part thereof was clearly found by the court below. In Finding No. III, on page 34 of the record, it is said:

> "It was agreed between plaintiff's representative and Mr. Wilson that the plant should be at the disposal of the Government from and after January 1, 1918," and "that without waiting for further instructions they were to prepare to proceed with the work."

It was further found by the court, in Finding No. V, on page 34:

> "The plaintiff had notified its customers that its entire plant was to be at the service of the Government after January 1, 1918; and had declined to take on any private business thereafter, and had canceled contracts and orders to be performed after that time."

It was further stated, in the same finding and on page 35, as follows:

> "Goods were not furnished for treatment by January 1st, in consequence of which the plant remained idle for a time. Some of the orders referred to were received about this time and they contained conditions which the plaintiff did not understand were a part of their agreement when prices were submitted, and plaintiff's representatives sought an interview with Mr. Wilson, in which they stated that these additional requirements would increase cost and would take away every element of profit, and that they did

> not want the orders under the conditions imposed. They were informed by Mr. Wilson that the Government had to have their production and was authorized by law to take over their plant, and if they refused it would probably result in a commandeering of their plant, and they would render themselves liable to criminal prosecution. Promise was made by Mr. Wilson that if they would go ahead and do the best they could prices would be so arranged in subsequent orders as to care for the unanticipated requirements."

This appropriation was further shown when the plaintiff was required to change its methods of insurance and to carry the policies in the name of the Government at a much higher rate, as is stated in Finding No. XIV, page 37, where it is said:

> "Afterwards it was required to carry separate policies on different lots in the name of the defendant to the full value of the goods at increased rates."

Relating particularly to the destruction of the business, the court further stated, in Finding No. XV, page 37, as follows:

> "The extent to which it had recovered its business during 1917 and the amount thereof during that year is not definitely shown. But whatever it was, it was given up that the capacity of its plant might from January 1, 1918, be devoted to Government work of the kind here involved. When in the latter part of 1917 this arrangement was made the plaintiff's plant, its processes, business, and good will as a going concern were valuable, but what the value thereof was is not shown to the satisfaction of the court on the present record."

These findings of the court below bring the present case squarely within the rule laid down in the case of *Roxford Knitting Co. v. Moore & Tierney,* 265 Fed., 177, which rule was approved by this court in 253 U. S., 498; 64 L., 1031. The demands of the Government in the Roxford case were of the same nature as in the case at bar; the orders and the method of enforcement were similar in form and effect; the obligation established in the one case must be the obligation in the other. In both cases the demands and orders of the Government were compulsory; the private parties had no option as to compliance; such performance, therefore, carries with it the obligation of the Government to reimburse the parties for the expenses incurred. In the opinion in the Roxford case, as found in 11 A. L. R., 1428, it is said:

> "And when a manufacturer is given to understand that he is required to supply certain goods to the Government of the United States, and is told that he has no option to decline to comply, we are satisfied that as to those goods an 'order' has been placed or received, within the spirit and intent and the letter of the statute, whether the authoritative direction is written or oral, and notwithstanding the fact that the parties actually come to an agreement in what has the form of a contract. Substance is not to be sacrificed in such cases to form."

This rule was approved in the cases cited in the notes on the case of *Brooks Tool Manufacturing Company, Limited, v. Hydraulic Gears Company, Limited,* 9 A. L. R., 1510, and in the notes on the case of *Allanwilde Transport Corporation v. Vacuum Oil Company,* 3 A. L. R., 23.

From these decisions it is clear that the court below, in

making the findings of fact as to the taking of the plaintiff's plant and its business, based those findings upon the rule of law above stated. The facts so found by the court below are definite and material. They are inseparable parts of one transaction. No objection was taken to these findings by the defendant in the court below, and they stand unimpeached and unimpeachable, both on the law and the evidence in this case.

The liability of the Government for the expenses incurred in taking the plaintiff's plant and its business down to the time when the testimony was taken was found and accepted by the court below in making Finding No. VIII of the record in passing upon the facts in the third cause of action, where the court below allowed the $47 per month as rent for the Wheeler House, of which the plaintiff was deprived soon after the plant and its business were demanded and taken over by the Government, and which loss of rental income was found to continue down to the date when the testimony was taken in the court below. This Finding No. VIII is in exact accordance with the facts in the case and with the rule of law as laid down in the Foxford case, above quoted. If the $47 per month was a continuing obligation of the Government after the armistice and the cancellation of the orders which was found by the court below, then the obligation for the expenses of preserving the plant and organization must also continue during a time found reasonable by the court. No exception was taken by the defendant in the court below to the judgment continuing the liability for the $47 per month down to the 28th day of February, 1921, and including it in the judgment on the third cause of action, and the balance of the obligation now in issue must continue

during the same period. The amount found due in connection with the Wheeler House, having been made a part of the judgment in favor of the plaintiff for $11,249.16, as set out on page 38 of the record, was in itself sufficient authority for including the $125,000.00 in the general judgment, which amount was also found by the court below to have been expended as alleged.

This finding was based upon the tenth cause of action, set out at page 18 of the record and quoted above, and shows upon its face that the claim of the plaintiff below in this cause of action was for the expenses incurred as a direct result of the compulsory demands of the defendants, and is not in any way or to any extent whatever founded upon any claim for compensation or profit upon any contract entered into between the parties. The plaintiff in this case was represented by loyal citizens of the Government, who were perfectly willing to do their part in the great war with Germany and have never sought to hold the Government liable for any amount of money which they might have made with their plant unobstructed and their business unimpeded. The plaintiff specifically founded this cause of action upon the direct expenses necessarily put up from month to month in order to keep "its business alive and its organization existent," as stated by the court. Its private business had been entirely destroyed. The amount so expended is an obligation of the Government clearly arising from its own demands.

There can be no question now raised as to the amount of these expenses. That question was fully presented to the court below and is specifically stated in Finding No. XV, quoted above. There can be no question as to the time when these expenses began and when they ended. There was no

question that these expenses were properly disbursed. These questions are not now raised and cannot be brought before this court. If the Government is liable for the necessary expenses incurred by private persons in taking their property and the business connected therewith for public use in the war with Germany, then this expense of $125,000.00 is a legal liability against the defendants. Congress necessarily made such expenses as these a part of such legal liability when the Government was authorized specifically to take private property and use it for the public prosecution of the war. These expenses are inherently a necessary part of the taking and use of the plaintiff's plant and its business. It is from a legal standpoint unthinkable that the Government could be authorized to take the plaintiff's plant and its business for a legitimate public use, and then to compel the plaintiff to pay the expenses incident to such an appropriation. This must necessarily be so or the appropriation would be unconstitutional. The statute which authorized this taking was constitutional, the purpose was legitimate, and the obligation of the Government follows.

The liability of the Government as claimed above is in accordance with the decisions of this court in the case of the *United States v. Russell,* 13 Wall., —; 80 U. S., 623; 20 L., 474, where it is said in the head notes:

> 1. Where the Government, in time of public danger, takes private property for public purposes, it is bound to make full compensation to the owner.
>
> 2. Where steamboats were impressed into public service from imperative military necessity, the Government is bound to make full compensation to the owner for the services rendered.

3. The employment and use of the steamboats raised an implied promise on the part of the United States to reimburse the owner for the services rendered and expenses incurred, and the Court of Claims has jurisdiction of such claims.

In the opinion Mr. Justice Clifford said:

"Such a taking of private property by the Government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate and the danger, as heretofore described, is impending; and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the Government to reimburse the owner to the full value of the service. Private rights under such extreme and imperious circumstances, must give way for the time to the public good, but the Government must make full restitution for the sacrifice.

"Beyond doubt, such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting Government freight pursuant to those orders. *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what, in good conscience, he is bound to pay to the plaintiff, but the law will not imply a promise to pay unless some duty creates such an obligation, and it never will sustain any such implication in a case where the act of payment would be contrary to duty or contrary to law." *Curtis v. Feidler,* 2 Black, 478 (67 U. S., XVII, 276).

This case was referred to and most extensively approved in the case of *Schillinger v. United States,* 155 U. S., 171; 39 L., 111. In the case the court quoted the finding of fact as set out in the *Russell* case as follows:

> "That in the case of each of these steamers, at the times when the same were respectively taken into the service of the United States, the officers acting for the United States, *did not intend to 'appropriate' these steamers to the United States, nor even their services; but they did intend to compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services, and such was the understanding of the claimant;* and that each of said steamers, so soon as the services for which they were respectively required had been performed, were *returned* to the exclusive possession and control of the claimant."

The case of the *United States v. Russell* is cited with approval in the case of *Crozier v. Krupp,* 224 U. S., 305, where it is said:

> "This inquiry may be solved, under the conditions here involved, by taking the most exacting aspect of the well established and indeed elementary requirements in favor of property rights essential to be afforded in order to justify the taking by Government of private property for public use."

This same proposition is well established in the language found in Cooley on Constitutional Limitations, fifth edition, page 701, where it is said:

> "But, in estimating either the injuries or the benefits, those which the owner sustains or receives in common with the community generally, and which are

> not peculiar to him and connected with his ownership, use, and enjoyment of the particular parcel of land, should be altogether excluded, as it would be unjust to compensate him for the one, or to charge him with the other, when no account is taken of such incidental benefits and injuries with other citizens who receive or feel them equally with himself, but whose lands do not chance to be taken."

In the notes upon the foregoing paragraph it is said, in the case of *Henry v. Dubuque and Pacific R. R. Co.*, 2 Iowa, 300:

> "That the language of the constitution means that the person whose property is taken for public use shall have a fair equivalent in money for the injury done him by such taking; in other words, that he shall be made whole so far as money is a measure of compensation, we are equally clear. This just compensation should be precisely commensurate with the injury sustained by having the property taken; neither more nor less."

This same position is further supported in the notes by a quotation from the case of *Holton v. Milwaukee*, 31 Wis., 27, where it is said:

> "Compensation is an equivalent for property taken, or for an injury. It must be ascertained by estimating the actual damage the party has sustained. That damage is the sum of the actual value of the property taken, and of the injury done to the residue of the property by the use of that part which is taken."

The plaintiff did not "sustain or receive in common with the community generally" these expenses; nor did the depression of the market because of the sale of Government goods "at prices below cost of production" occur until many

months after these expenses began, and until large parts of them had been incurred. These expenses are peculiar to the plaintiff, and are connected directly with its ownership, use, and enjoyment of its own particular property and business, which in itself gives a basis for a further judgment for the $125,000.00. It is brought within the rule of the *Russell* case where the Government was held liable for the "services rendered and the expenses incurred." It is also within the rule stated in the *Henry* case where "just compensation should be precisely commensurate with the injury sustained by having the property taken; neither more or less."

The difference between the doctrine of Government liability for private property taken for public use, and the doctrine of *damnum absque injuria,* where loss is inflicted without liability, is clear and distinct. The one doctrine is within the rule of the *Russell* case for the taking of the steamboats where the act required the "United States to reimburse the owner for the services rendered and expenses incurred," and the other doctrine within the rule of the Soda Lake cases recently affirmed by this court, where a loss was inflicted but no taking of property was proved or found. The claim in issue is within the rule of the *Russell* case, where the taking is found, and not governed by the rule in the Soda Lake cases, where the alleged taking was not found to be true. The rights of the plaintiff have been fixed by these decisions of the several courts.

The conditions which confronted this plaintiff and made the expenditure of the $125,000.00 a necessity were apprehended and dealt with by this court in the recent case of *The Railroad Commission of Wisconsin v. The Chicago, Bur-*

lington & Quincy Railroad Company, 257 U. S., advance sheets, L. Ed., page 241, where it is said by Mr. Chief Justice Taft:

> "The owners insisted that their properties could not be turned back to them by the Government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses."

The conditions which confronted this plaintiff are fully described in the findings of fact by the court below and come strictly within the situation described by the Chief Justice. The principle there laid down should be applied in the case at bar. Congress was called upon to legislate in order to meet the conditions confronting the railroads. In the case of the plaintiff, however, the findings of fact show that the $125,000.00 were expended to meet a situation existing as to its plant and business growing out of the demands of the Government as authorized by the National Defense Act of June 3, 1916. The situation which confronted the plaintiff included "a demoralizing lack of credit and income," which was apprehended by the court below and made conclusive in the findings of fact, which situation still remains unprovided for and which can only be met by a corrected judgment in this case.

Respectfully submitted,

S. S. ASHBAUGH,
Attorney for Appellant.